STATE OF MINNESOTA

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward Garvey	Chair
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Gregory Scott	Commissioner

In the Matter of the Petition of Minnesota Cellular Corporation for Designation as an Eligible Telecommunications Carrier	Docket No. P5695/M-98-1285

INITIAL BRIEF OF THE DEPARTMENT OF PUBLIC SERVICE

I. INTRODUCTION AND SUMMARY OF THE DEPARTMENT'S RECOMMENDATIONS

On September 1, 1998, Minnesota Cellular Corporation (MCC) filed a Petition for Designation as an Eligible Telecommunications Carrier (ETC) for the receipt of support from the federal universal service program and any state universal service fund to be established under Minn. Stat. § 237.16, subd. 9. The company also requested a permanent partial variance of Minn. Rule 7811.1400, subp. 2, which in combination with Minn. Rule 7811.0100, subp. 12 (defining competitive local exchange carrier or CLEC), restricts an ETC designation to either a "telecommunications carrier" or a "telephone company." On September 23, 1998, the Commission issued a Notice seeking Initial Comments. U S WEST Communications Inc. (U S WEST), the Minnesota Independent Coalition (MIC), and Frontier Communications of Minnesota, Inc. (Frontier) filed Motions to Intervene. These parties, the Department of Public Service (Department), and the Office of the Attorney General, Residential Utilities Division (OAG-RUD) participated in the comment rounds. MCC subsequently asked that its request for ETC designation for the purpose of state universal service funding be stayed pending resolution of state universal service issues. On January 5, 1999, the Commission decided to hold an expedited

proceeding on MCC's request for designation as an ETC for the purposes of receiving federal universal service funding only. Hearings took place June 2, 3, and 21, 1999.

The Department supports MCC's Petition for Designation as an ETC for purposes of receiving federal universal service funding, provided that MCC completes further actions necessary to comply fully with the eligibility requirements for receiving federal universal service funding. This Initial Brief first discusses the Commission's jurisdiction over ETCs, both at the time of and after ETC designation. Second, this Initial Brief discusses the steps MCC has successfully completed so far toward becoming eligible to receive federal universal service funding -- MCC has demonstrated that it is a common carrier, that it has the ability and intent to provide the nine supported services identified by the FCC, and that its designation in rural service areas would be in the public interest. This Initial Brief also discusses the additional steps MCC must take in the future -- filing of its detailed universal service offering, including specific prices, terms, and conditions, with the Commission for further evaluation and comment by other parties; and submission to continuing Commission oversight. This Initial Brief explains the Department's proposed process for determining compliance with the requirements for ETCs -- a procedure that lowers barriers to competitive entry while still ensuring that petitioners fully comply with the ETC and general universal service requirements. Third, this Initial Brief advocates that, if MCC is designated as an ETC, it should receive ETC designation in the service area that it has requested, including the requested Frontier exchanges. The Commission should also consider disaggregating the rural telephone companies' study areas into smaller service areas.

II. COMMISSION JURISDICTION OVER ETCS

A. Overview: Two avenues for the Commission to exercise jurisdiction over ETCs.

The Commission must first determine its jurisdiction over designating MCC as an ETC for purposes of receiving federal universal service funding, and over ensuring MCC's continued compliance with the ETC and general universal service requirements. A threshold question is the extent to which the Commission can exercise jurisdiction over a CMRS provider in universal

service matters. Once jurisdiction is established, the Commission must decide which, if any, Minnesota rules on universal service apply in this proceeding. The state Universal Service Rulemaking (Docket No. P-999/R-97-609) is still in the task force stage. At this time, the only Minnesota rules addressing designation of an ETC for purposes of receiving federal or state universal service funds are Minn. Rules 7811.1400 and 7812.1400.[1] Subpart 1 of this rule designates all incumbent LECs as ETCs. Subpart 2 allows CLECs to petition for ETC designation. Under Minn. Rule 7811.0100, subp. 12, a CLEC is defined as "(A) a telecommunications carrier that is certified by the commission to provide local service; or (B) a telephone company to the extent it provides local service in an exchange area for which neither the company nor any of its predecessors was certified on August 1, 1995." Thus, if Rule 7811 applies to MCC, then MCC must be a CLEC telecommunications carrier that is certified by the Commission to provide local service and apply for ETC designation under Rule 7811.0400, subp. 2.

There are two avenues for the Commission to exercise jurisdiction over MCC as an ETC. First, the Commission could decide that Minn. Rule 7811 does not apply to MCC, and instead rely on the Commission's general authority under 47 U.S.C. §§ 214 and 254, which require state commissions to evaluate petitions for ETC designation and to address other universal service requirements. Second, the Commission could decide that Minn. Rule 7811 applies to MCC, and that MCC is therefore subject to that Rule's requirements.

The Commission should follow the first avenue and exercise jurisdiction over MCC pursuant to its general authority under 47 U.S.C. §§ 214 and 254. Under this avenue, the Commission, without reliance on previously existing state rules, may adopt requirements as necessary to enable the Commission to determine whether to designate a carrier an ETC, as well

[1] Hereafter, all references to sections of Rule 7811 also include the parallel section in Rule 7812.

as to ensure that an ETC meets the general standards for universal service set forth in 47 U.S.C. § 254, such as service quality and affordable rates.

B. Commission authority under Minnesota law over CMRS providers in universal service matters.

The Commission has implied authority under Minnesota law to act on MCC's ETC Petition, despite the lack of express authority over commercial mobile radio service (CMRS) providers. The Commission has express authority to act in accordance with federal statutes and the FCC's rules, and in particular the federal statutes and rules relating to universal service. The federal statutes and rules direct the Commission to designate all qualifying carriers, including wireless, as ETCs, and to ensure that all carriers, including wireless, meet the general universal service requirements.

Minn. Stat. §§ 237.02 and 237.035 grant the Commission authority expressly only over "telephone companies" and "telecommunications carriers." Neither term includes CMRS providers. *See* Minn. Stat. § 237.01. Thus, arguments have been raised that the Commission does not have authority to designate CMRS providers as ETCs, or does not have authority to subject CMRS providers to general universal service requirements. However, the Commission's authority can be implied as well as express. "[A]ny enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature." *Peoples Natural Gas Co. v. Minnesota Public Utilities Comm'n*, 369 N.W.2d 530, 534 (Minn. 1985).

Implied authority over designating CMRS providers as ETCs, and ensuring that they meet the general universal service requirements, is "fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature." *Id*. The Minnesota legislature has expressly authorized the Commission "to cooperate with all federal agencies for the purpose of harmonizing state and federal regulations within the state to the extent and in the manner deemed

advisable." Minn. Stat. § 216A.05, subd. 6(1). The legislature has also expressly authorized the Commission to act in the public interest as to telephone utility regulation in a number of provisions. *See, e.g.*, Minn. Stat. §§ 216A.05, 237.02, 237.06, 237.075, 237.081, 237.16.

In addition, the Minnesota legislature has specifically and expressly granted the Commission authority to take action on universal service matters. Minn. Stat. § 237.011 directs the Commission to take into account "supporting universal service" when executing its regulatory duties with respect to telecommunication services. Minn. Stat. § 237.16, subd. 8(a), directs the Commission to adopt rules "using any existing federal standards as minimum standards . . . [to] prescribe methods for the preservation of universal and affordable local telephone services."[2] In addition, the Minnesota legislature has expressly granted the Commission authority to exercise the oversight over the universal service system required by the federal statute and the FCC's rules. Minn. Stat. § 237.16, subd. 9, specifically directs the Commission to establish requirements concerning universal service. This provision directs the Commission to establish and require contributions to a universal service fund. The Commission can require contributions from radio common carriers, personal communication service providers, and cellular carriers, among other telephone service providers. This fund "must be coordinated with any federal universal service fund and be consistent with section 254(b)(1) to (5) of the federal Telecommunications Act of 1996, Public Law Number 104-104." Thus, the legislature has expressly directed this Commission to act consistently with the federal universal service statutory provisions and the FCC rules implementing those provisions.

The aforementioned statutory provisions, which constitute an express legislative grant of authority to act on universal service consistent with the federal statute and rules, grant the Commission implied authority to follow the specific federal universal service mandates. These mandates include designating all qualifying carriers, including wireless, as ETCs, and ensuring that

[2] Once the Commission has exercised the rulemaking authority granted by the legislature by the statutory deadline, the Commission may subsequently amend the rules as appropriate without additional legislative authorization. Minn. Stat. § 14.125.

all carriers, including wireless, meet the general universal service requirements. "A State commission shall . . . designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission." 47 U.S.C. § 214(e)(2). "We also reaffirm that under section 214(e), a state commission must designate a common carrier, including carriers that use wireless technologies, as an eligible carrier if it determines that the carrier has met the requirements of section 214(e)(1)." *Federal-State Joint Board on Universal Service*, Seventh Report & Order and Thirteenth Order on Reconsideration and Further Notice of Proposed Rulemaking, CC Docket No. 96-45 (1999) (*Universal Service 7th R&O and 13th Order on Reconsideration and FNPRM*), at ¶ 72 (footnote omitted).

Moreover, regardless of whether the Minnesota legislature has specifically authorized the Commission to act, the federal Communications Act preempts the state from taking any action inconsistent with the federal Act, and from refusing to carry out the federal Act's and the FCC's requirements. The United States Supreme Court has held that states must comply with FCC rules implementing the 1996 Telecommunications Act: "§ 201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies." *AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721, 730 (1999). 47 U.S.C. § 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Therefore, if the Commission is to take any action concerning universal service, it must act consistently with the federal Act's and FCC's pro-competitive mandates. Those mandates include designating wireless carriers as ETCs and ensuring they meet the general universal service requirements.

Finally, the Commission's implied authority over CMRS providers extends to all authority necessary to comply with the federal universal service statute and rules. MCC does not get to pick and choose what authority the Commission has over its provision of universal service. MCC argues that the Commission has authority only to take actions favorable to MCC (*i.e.*, designate

MCC as eligible to receive universal service funding), but not to take actions undesirable to MCC (*i.e.*, ensure continued compliance with ETC requirements and general universal service rules). Ex. 1 at 18, 21 (DeJordy Direct Testimony); Ex. 2 at 3-6, 10-11 (DeJordy Reply Testimony). If, as MCC claims, it is completely not subject to the Commission's jurisdiction, then it can be argued that MCC's application for ETC designation should properly be before the FCC instead, pursuant to 47 U.S.C. § 214(e)(6). Section 214(e)(6), a 1997 amendment to the Telecommunications Act of 1996, provides for the FCC to designate as ETCs common carriers which so request and which are not subject to state commission jurisdiction. Language in the *Universal Service Order* indicates that CMRS providers might be in this category.

> We note that not all carriers are subject to the jurisdiction of a state commission. Nothing in section 214(e)(1), however, requires that a carrier be subject to the jurisdiction of a state commission in order to be designated an eligible telecommunications carrier. Thus tribal telephone companies, CMRS providers, and other carriers not subject to the full panoply of state regulation may still be designated as eligible telecommunications carriers.

Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, CC Docket No. 96-45 (1997) (*Universal Service Order*), at ¶ 147 (footnote omitted). The plain language of 47 U.S.C. § 214(e)(6), read together with the above language in the *Universal Service Order*, seems to indicate that a CMRS provider that is not subject to the jurisdiction of a state commission, as MCC claims itself to be, can apply to the FCC for ETC designation. If MCC refuses to accept the burdens of the Commission's authority as well as the benefits, then it should attempt to file its ETC Petition with the FCC instead.

C. First Avenue: Commission authority over ETCs under 1996 Telecommunications Act.

1. The Commission can designate ETCs in the absence of specific state rules.

Under the first avenue, the Commission can designate MCC as an ETC pursuant to its general authority under 47 U.S.C. §§ 214 and 254, despite the absence of specific state rules addressing ETC designation for CMRS providers. The Commission is not required to adopt specific rules to designate any carrier an ETC solely for purposes of receiving federal funding, and is not permitted to adopt ETC criteria in addition to those adopted by the FCC. *See Universal Service Order* at ¶¶ 135-36. The federal statute does not require states to adopt such rules. While 47 U.S.C. § 254(a)(2) states that the FCC "shall" adopt universal service rules, 47 U.S.C. § 254(f) merely states that a State "may" adopt regulations regarding universal service. Thus, the Commission, without reliance on previously existing state rules, may adopt requirements as necessary in the course of an ETC Petition proceeding that would enable the Commission to satisfy its statutory obligation to determine whether to designate a carrier an ETC.

2. Commission authority over ETCs pursuant to 47 U.S.C. § 214(e): Eligibility.

Section 214(e) contains requirements that an ETC must meet in order to be eligible to participate in the universal service system. Under section 214(e), the FCC has the authority to set eligibility criteria, and the state commissions have the authority to determine whether a carrier meets the criteria. State commissions also have the authority to monitor and enforce continued compliance with the eligibility criteria for as long as the carrier is providing universal service.

The Commission's decisional process at this point in this ETC designation proceeding is analogous to the process of determining whether to grant a certificate of authority to provide service.[3] To be declared eligible, MCC has to demonstrate that it has the ability to provide the supported services once it is allowed to receive universal service funds, and commit to providing those services. MCC can show this by demonstrating that it has the infrastructure in place to

[3] Indeed, the title of 47 U.S.C. § 214 is "Extension of lines or discontinuance of service; certificate of public convenience and necessity."

provide these services and that it is already providing these services in some fashion, and outlining its plans for its universal service offering.

Once MCC receives ETC designation, it must maintain its eligibility by following through on its commitment and providing the supported services. Eligibility is not a test for one point in time. Eligibility must be continually maintained if the carrier wants to continue to receive universal service funding. The FCC has stated that designation as an ETC does not automatically entitle a carrier to federal universal service support; the carrier must also provide the designated services to customers pursuant to the terms of section 214(e), and must continue to comply with the federal criteria. "[A] carrier's continuing status as an eligible carrier is contingent upon continued compliance with the requirements of section 214(e)." *Universal Service Order* at ¶ 138. Thus, eligibility must continue and can be lost if the carrier does not continue to comply with the ETC criteria. Since the Commission specifically has authority over designation of ETCs, as well as authority over permitting a carrier to relinquish its ETC status, *see* 47 U.S.C. § 214(e)(4), the entity with authority to monitor compliance with the eligibility requirements and revoke eligibility for noncompliance is, likewise, the Commission. Even MCC acknowledges that the Commission has continuing oversight over its compliance with the ETC criteria, and can revoke MCC's ETC status for noncompliance. Tr. Vol. 1 at 83, 211-12 (DeJordy).

The Commission's authority over ETC designation includes ongoing authority to oversee whether MCC is maintaining its eligibility, for as long as MCC provides universal service. It would make no sense to have MCC only satisfy the eligibility criteria at one moment in time -- the time of the Commission's initial determination of eligibility -- and then be able to receive universal service funding for years to come without continuing to provide the supported services. Moreover, "[u]niversal service is an evolving level of telecommunications services that the [FCC] shall establish periodically." 47 U.S.C. § 254(c)(1). Thus, the FCC may later find that additional services should be included in the list of core supported services. *Universal Service Order* at ¶¶ 84, 87. The Commission must have continuous authority to review compliance with the ETC criteria if the criteria will continually evolve. To determine continued compliance with the

eligibility criteria, the Commission may monitor the carrier's service provision through a combination of compliance filings, reporting requirements, action on complaints, or some other means.

3. Commission authority over ETCs pursuant to 47 U.S.C. § 254: General universal service requirements.

Once designated as an ETC, MCC must also follow the general universal service rules -- the requirements set up by 47 U.S.C. § 254, and the FCC and state commission requirements adopted pursuant to that statutory section. Sections 214(e) and 254 are meant to work together; carriers cannot receive universal service funding without satisfying the requirements of both provisions. Section 214(e) directly refers to section 254: "A common carrier designated as an eligible telecommunications carrier . . . shall be eligible to receive universal service support in accordance with section 254 of this title and shall . . . offer the services that are supported by Federal universal service support mechanisms under section 254(c) . . ." 47 U.S.C. § 214(e)(1)(A). Likewise, section 254 makes compliance with section 214(e) a prerequisite for obtaining funding under section 254. "[O]nly an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support." 47 U.S.C. § 254(e).

States have clear general authority to adopt requirements for universal service other than additional eligibility criteria: "A State may adopt regulations not inconsistent with the [FCC's] rules to preserve and advance universal service." 47 U.S.C. § 254(f). "Although section 214(e) precludes states from imposing additional eligibility criteria, it does not preclude states from imposing requirements on carriers within their jurisdictions, if these requirements are unrelated to a carrier's eligibility to receive federal universal service support and are otherwise consistent with federal statutory requirements." *Universal Service Order* at ¶ 136. Moreover, the FCC has explicitly endorsed state requirements that are enacted to monitor compliance with the requirements for ETCs. "We adopt the Joint Board's recommendation that we rely upon state

monitoring of the provision of supported services to ensure that universal service support is used as intended until competition develops." *Universal Service Order* at ¶ 181 (footnote omitted).[4]

The Commission also has specific authority to ensure that MCC meets the general standards for universal service set forth in 47 U.S.C. § 254, such as service quality and affordable rates. 47 U.S.C. § 214(e)(1) states that an ETC shall be eligible to receive universal service support in accordance with section 254. Section 254(b)(1) states: "Quality services should be available at just, reasonable, and affordable rates." Section 254(i) states: "The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable." Indeed, the FCC has ordered state commissions to take primary responsibility for monitoring service quality and determining the affordability of rates. *See Universal Service Order* at ¶¶ 99-101, 118. Thus, if the Commission decides to grant MCC designation as an ETC, it can also in its Order require that MCC's universal service offering meets certain service quality standards and review that offering's rates for affordability.

Regulation of MCC's service quality is not preempted under 47 U.S.C. § 332(c)(3)(A). Section 332(c)(3)(A) specifically states that nothing in this section shall prohibit a state from

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[4] The Federal-State Joint Board on Universal Service (Joint Board) has also indicated its support for allowing states to adopt requirements to ensure that ETCs comply with section 254. The Joint Board has recommended permitting states to certify that, in order to receive federal universal service high cost support, a carrier must use such funds in a manner consistent with section 254, *e.g.*, requiring that federal support be targeted to those consumers living in the highest cost areas within a study area. The Joint Board has recommended that the FCC reduce or eliminate federal high cost support if the FCC or a state finds that the carrier has not adequately demonstrated that the federal support is being used in a manner consistent with section 254(e), *i.e.*, only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. *Federal-State Joint Board on Universal Service*, Second Recommended Decision, 13 FCC Rcd 24744, CC Docket No. 96-45 (1998) (*Second Recommended Decision*), at ¶¶ 59-60. The Joint Board does not believe that imposition of such conditions by a state violates section 214(e)(2) by placing any restrictions on the determination of a carrier's status as an ETC. *Second Recommended Decision* at ¶ 60. In addition, the Joint Board has recommended that the FCC clarify procedures by which a party, including a state, may initiate action against a carrier that fails to apply federal universal service support in an appropriate manner. *Second Recommended Decision* at ¶ 59. The FCC is seeking comment on the Joint Board's conclusions. *Universal Service 7th R&O and 13th Order on Reconsideration and FNPRM* at ¶¶ 113-15.

"regulating the other terms and conditions of commercial mobile services." Regulation of service quality would be regulation of "other terms and conditions" rather than regulation of rates or entry. The "other terms and conditions" language has been interpreted broadly, particularly in the context of state universal service regulation. The FCC held that a Texas requirement for CMRS providers to contribute to state universal service support falls within the "other terms and conditions" language, even if such a requirement might affect CMRS rates. *Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 1735 (1997), at ¶ 17; *aff'd, Cellular Telecommunications Industry Ass'n v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999).

The FCC has concluded that "states may adopt and enforce service quality rules that are competitively neutral, pursuant to section 253(b), and that are not otherwise inconsistent with rules adopted herein. We concur with commenters that favor state implementation of carrier performance standards." *Universal Service Order* at ¶ 101 (footnotes omitted). To determine whether the carrier is complying with the general requirements, the Commission may monitor the carrier's service provision through a combination of compliance filings, reporting requirements, action on complaints, or some other means.

> We conclude that state-imposed measures to monitor and enforce service quality standards will help "ensure the continued quality of telecommunications services, and safeguard the rights of consumers," consistent with section 253(b). In light of the existing state mechanisms designed to promote service quality, we conclude that state commissions are the appropriate fora for resolving consumers' specific grievances regarding service quality.

Universal Service Order at ¶ 101 (quoting 47 U.S.C. § 253(b)). In addition, one way to encourage competitive neutrality would be to require all carriers to meet similar service quality standards. Thus, the Commission could require MCC to practice service quality standards similar to those that Rule 7811 provides for wireline carriers.

Review of MCC's rates for affordability is also not preempted under 47 U.S.C. § 332(c)(3)(A). Evaluating whether a carrier's rates are "just, reasonable, and affordable" does not constitute rate "regulation." The Commission would not be restricting the rates that MCC may charge. The Commission is merely looking at the rates that MCC charges to determine whether MCC should receive a subsidy.

C. Second Avenue: Commission authority over ETCs under Minn. Rule 7811.1400.

Under the second avenue, the Commission could decide that Minn. Rule 7811.1400 applies to all applicants for both state and federal universal service funding, and is the only means for obtaining any ETC designation. Thus, in order to receive funding, MCC must first apply for certification to provide local service as a CLEC.[5]

On their face, Chapters 7811 and 7812 appear to apply to CMRS providers. Rule 7811.0050 states that Chapter 7811 "applies to the provision of telecommunications service in any area served by" a LEC with fewer than 50,000 subscribers. Rule 7812.0050 states that Chapter 7812 "applies to all telecommunications service providers operating under the commission's jurisdiction in Minnesota, except regarding the provision of local telephone service in any area served by a telephone company that" has fewer than 50,000 subscribers. "Telecommunications service" is defined in Rules 7811.0100, subp. 47, and 7812.0100, subp. 47, as "the offering of telecommunications under the commission's jurisdiction for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Thus, it seems that Chapters 7811 and 7812 apply to CMRS providers at least to the extent that CMRS is "under the commission's jurisdiction." As discussed above, 47 U.S.C. § 332(c)(3)(A) explicitly provides states with limited jurisdiction over CMRS providers.

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[5] The OAG-RUD's arguments for applying existing Minn. Rules 7811 and 7812 to MCC are to a large degree consistent with this second avenue. *See* Initial Statement of the OAG-RUD (OAG-RUD Statement) at 3-7; *see also* Ex. 38 at 48, 51 (Wilcox Testimony).

If the Commission decides to follow this second avenue, the Commission should not grant a permanent variance of Minn. Rule 7811, as advocated by MCC. To justify either a permanent or temporary variance of Rule 7811, MCC must demonstrate that: (1) enforcement of the rule would impose an excessive burden upon the applicant or others affected by the rule; (2) granting the variance would not adversely affect the public interest; and (3) granting the variance would not conflict with standards imposed by law. Minn. R. 7829.3200, subp. 1. MCC has not shown that its request for a variance meets any of these criteria. Moreover, past Commission decisions have disapproved of permanent variances. *See In Re Minnegasco*, Docket No. G008/GR-95-700, 170 P.U.R. 4th 193, 1996 WL 361224 (Minn. PUC 1996) (denying a request for a permanent variance of a rule as inappropriate as a matter of public policy, and stating that the proper remedy, if warranted, would be to change the rule). Minn. Rule 7829.3200, subp. 3, provides that variances automatically expire in one year unless the Commission orders otherwise. Even granting a "temporary" variance, *e.g.*, until the Commission adopts rules that specifically address designation of CMRS providers as ETCs in its Universal Service Rulemaking, may effectively result in an indefinite variance, since it is unclear whether the state universal service fund rulemaking will adopt rules that specifically address designation of CMRS providers as ETCs.

D. The Commission should follow the first avenue rather than the second avenue.

The Commission should follow the first avenue. Under the first avenue, the Commission can exercise broad general authority over MCC's provision of universal service pursuant to 47 U.S.C. §§ 214 and 254, which require state commissions to evaluate petitions for ETC designation and to address other universal service requirements. Such authority encompasses the ability to adopt requirements as necessary to enable the Commission to determine whether to designate a carrier an ETC, as well as to ensure that MCC meets the general standards for universal service set forth in 47 U.S.C. § 254, such as service quality and affordable rates. The first avenue appears more legally sound and permits the Commission greater flexibility to adopt requirements as necessary during and after the course of this proceeding.

In contrast, the second avenue entails several difficulties. Minn. Rule 7811.1400 was likely designed only for wireline applicants for universal service funding, not CMRS applicants. Rule 7811 was authorized by Chapter 237.16, subd. 8, which ordered the Commission to "adopt rules applicable to all telephone companies and telecommunications carriers required to obtain or having obtained a certificate for provision of telephone service." CMRS providers do not need to obtain a certificate. Thus, according to this line of reasoning, Rule 7811 was not intended to, nor authorized to, cover CMRS providers.

Moreover, the Commission has limited jurisdiction over the entry or rates of CMRS. Under 47 U.S.C. § 332(c)(3)(A), "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." Accordingly, Rule 7811 could not have been intended to apply to CMRS providers because certain provisions of that rule would impermissibly regulate the entry of or the rates charged by a CMRS provider, and be preempted under 47 U.S.C. § 332(c)(3)(A) or 47 U.S.C. § 253.[6]

Finally, the Commission should choose the first avenue in its entirety (*i.e.*, decide it has authority over ETCs both at the time of designation and afterward, and under both 47 U.S.C. § 214(e) and 47 U.S.C. § 254) in order to avoid inadvertently surrendering any Commission jurisdiction over MCC. MCC has indicated that it will resist following the 47 U.S.C. § 254 requirements unless ordered to by the Commission. For example, Mr. DeJordy claims that the Commission cannot require that its universal service offering be affordable. Ex. 2 at 4, 5 (DeJordy Reply Testimony). Thus, the Commission should act affirmatively to ensure that MCC will meet the general universal service requirements mandated by 47 U.S.C. § 254.

[6] 47 U.S.C. § 253(a) forbids any state requirements that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

III. MCC'S PROGRESS ALONG THE ROAD TO UNIVERSAL SERVICE.

A. Sequence of universal service process and timing of availability of the supported services.

Universal service is an ongoing linear process. First, a carrier must demonstrate its eligibility to participate in the process. Afterward, while the carrier is providing universal service, it must maintain its eligibility for as long as it is receiving universal service funding. If it later violates the eligibility rules, it can be declared ineligible to receive universal service funding. The Commission has the authority under 47 U.S.C. § 214(e) to decide whether to designate a carrier as eligible, and to verify that the carrier is maintaining its eligibility by providing the supported services pursuant to the terms of section 214(e). The 1996 Telecommunications Act itself neither prescribes nor proscribes any particular verification procedures. The Commission should establish reasonable verification methods which should include compliance filings and periodic reports to the Department. In addition, the Department and the Commission should stand ready to investigate and act upon any complaints.

Second, after the carrier becomes eligible, while providing universal service it must also follow all the general universal service requirements prescribed by 47 U.S.C. § 254, or by the FCC or a state commission pursuant to section 254. Such requirements may ensure the offering of universal service at just, reasonable, and affordable rates, and subject to adequate service quality standards. In addition, an ETC cannot actually provide universal service and receive universal service funding unless a customer chooses to subscribe to universal service from that carrier. If the ETC violates the general universal service rules, it will be subject to whatever action the state commission deems appropriate to enforce those rules. As with the eligibility requirements, to determine whether the carrier is complying with the general rules, the Commission may monitor the carrier's service provision through a combination of compliance filings, reporting requirements, action on complaints, or some other means.

The plain language of 47 U.S.C. § 214(e)(1) demonstrates that Congress envisioned that a carrier that wishes to obtain universal service funding must follow a linear progression of steps.

> A common carrier *designated* as an [ETC] . . . *shall* be eligible to receive universal service support in accordance with section 254 of this title and *shall*, throughout the service area for which the designation is received --
>
> (A) offer the services that are supported by Federal universal service support mechanisms . . . ; and
>
> (B) advertise the availability of such services . . . .

47 U.S.C. § 214(e)(1) (emphasis added). Thus, at the time when section 214(e)(1) comes into play, a carrier's ETC designation is already in the past tense. When section 214(e)(1) applies, a carrier that has been designated as an ETC *shall* then, from this point on, be eligible to obtain funding, offer the supported services, and advertise the availability of such services.

The FCC has confirmed this reading of the statute. The FCC construed 47 U.S.C. § 214(e) to set forth a sequence of events that must take place for a carrier to receive universal service funding. First, the carrier must petition successfully for ETC designation. Then, the carrier must provide the supported services to customers, at which point the carrier will receive universal service funds. The carrier must continue to provide the supported services in compliance with the requirements of 47 U.S.C. §§ 214(e) and 254 in order to continue receiving support.

> [A] carrier must meet the section 214(e) criteria as a condition of its being designated an eligible carrier and *then* must provide the designated services to customers pursuant to the terms of section 214(e) in order to receive support. Indeed, the language of section 254(e), which states that "only an eligible telecommunications carrier designated under section 214(e) shall be *eligible* to receive" universal service support, suggests that a carrier is not automatically entitled to receive universal service support once designated as eligible.

Universal Service Order at ¶ 137 (emphasis in original, footnotes omitted). This language shows that the FCC views designation as an ETC as a prior and separate event from the provision of the designated services. Thus, the carrier need not be actually providing the supported services at the time of its petition for ETC designation. Rather, there is a sequential progression -- ETC designation, then provision of supported services, then receipt of funding.

The Department disagrees with the contention of U S WEST and MIC that MCC must be actually providing the federally supported services, throughout the entire service area for which universal service funding is requested, at the time it petitions for designation as an ETC. Ex. 38 at 9-11 (Wilcox Direct Testimony); Ex. 41 at 5-8 (Farm Direct Testimony). On the contrary, a petitioner need only show its ability to provide and certify that it will provide the federally supported services, in the service areas for which universal service funding is requested. While current provision of a service is probably the best demonstration of capability to provide that service, provision is not the only means of demonstrating capability. Once the petitioner receives ETC designation, it must provide those services to all requesting customers within its designated service area and advertise its universal service offering throughout its service area.

Moreover, requiring actual provision of the supported services before ETC designation skews the universal service rules in favor of incumbent LECs. The only class of carriers that could feasibly provide all the supported services throughout the requested designation area before the time of their ETC designation are incumbent LECs. Without the assurance of eligibility for universal service funding, it is unlikely that any ETC petitioner that is not an incumbent LEC already required to serve high-cost areas would make the necessary investments to provide a universal service offering in those areas. Requiring provision of universal service before receipt of ETC designation thus creates a barrier to competitive entry and disadvantages competitive carriers. This violates competitive neutrality, which the FCC has adopted as an additional universal service principle. *See Universal Service Order* at ¶¶ 46-52. "[C]ompetitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor

disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." *Universal Service Order* at ¶ 47.

Finally, the petitioner need not provide service to the entire service area at the time of the petition, but rather must demonstrate that it can and will cover whatever part of the service area for which its service is requested. Similarly, incumbent LECs, who have already been designated ETCs, do not necessarily provide service to their entire service area; rather, they are merely required to provide service to uncovered areas upon request.

> An LSP designated an ETC by the commission must provide local service, including, if necessary, facilities-based service, to all *requesting* customers within the carrier's service area on a nondiscriminatory basis, regardless of a customer's proximity to the carrier's facilities. An LSP may assess special construction charges approved by the commission if existing facilities are not available to serve the customer.

Minn. R. 7811.0600, subp. 4 (emphasis added). MIC witness Farm acknowledged that MIC members have unserved areas within their study areas for which they build out facilities upon customer request. Tr. Vol. 3 at 79-80 (Farm). Mr. Farm even acknowledged that such buildout might take as long as eight months, depending on various factors. Tr. Vol. 3 at 80 (Farm).

B. The Road to Universal Service: Procedure for ensuring MCC's compliance with requirements of 47 U.S.C. §§ 214(e) and 254.

The Commission should adopt the five-checkpoint procedure discussed below to ensure that MCC complies with the requirements of 47 U.S.C. §§ 214(e) and 254. As discussed above, the Commission has broad authority to adopt requirements to oversee the universal service process, both for eligibility and for general universal service requirements. The Commission has the discretion to consider the adequacy of its existing procedures (*e.g.*, tariffs) to provide necessary information about carriers' provision of universal service, and to adopt additional requirements where the existing procedures fall short. The Commission does not currently have in place procedures that would result in MCC providing all necessary information. First, MCC, as a wireless carrier, does not otherwise submit information on its service offerings to the

Commission and is not subject to the service quality requirements of Minn. Rules 7811 and 7812. Second, like wireline CLECs and unlike incumbent LECs, it is not feasible for MCC to provide a universal service offering before receiving designation as an ETC. Since MCC is permitted to receive ETC designation before actual provision of its universal service offering, the Commission should require MCC to demonstrate, through submission of an universal service offering, that it is ready to provide a universal service package in compliance with the FCC's ETC criteria. The following discussion outlines five specific checkpoints that take these two factors into account.[7] Attachment 1 (The Road to Universal Service) also outlines the checkpoints.

- **Checkpoint One: Eligible Telecommunications Carrier (ETC) Designation.** At this time, MCC demonstrates its ability and commitment to provide the nine supported services identified by the FCC (including a minimum level of local usage, at a reasonable price, that the Commission deems appropriate). MCC also demonstrates that it is a common carrier, and that its designation as an ETC in areas served by rural telephone companies would be in the public interest.
- **Checkpoint Two: ETC Universal Service Offering (USO).** Once MCC receives ETC designation and determines the particulars of its universal service offering, it makes a compliance filing to the Commission. This filing should explain its offering in detail and show that the rates, terms and conditions of its offering comply with the ETC criteria of section 214(e). This filing should also outline how MCC's offering complies with whatever state laws and Commission rules are relevant and applicable to MCC pursuant to section 254, such as service quality and affordability. In particular, MCC should use the

[7] The Commission should adopt this procedure instead of initiating a new rulemaking to establish procedures for wireless carriers' provision of universal service. If the Commission decides specific rules are necessary, such procedures can be included in the existing state universal service rulemaking, Docket No. P-999/R-97-609. However, since that rulemaking is only in the task force stage, the Commission should adopt interim procedures now, if the Commission decides to designate MCC as an ETC. In addition, the Commission may not want to adopt specific rules, and instead retain flexibility to adopt different compliance requirements for different carriers, according to their unique situations.

Commission's existing rules on service quality as a benchmark, and outline how its offering compares to existing Commission rules in matters such as disconnects, deposits, billing disputes, and customer complaints.[8] The Commission can then determine whether to require MCC to follow requirements similar to the existing service quality rules. This filing should also contain MCC's advertising plan.

- **Checkpoint Three: USO Objection Period.** The Commission puts MCC's compliance filing out for public comment. Thirty days should be allowed for any objections to be filed.
- **Checkpoint Four: Commission's Approval/Rejection of USO.** The Commission decides whether MCC's compliance filing conforms to the section 214(e) ETC criteria and any requirements the Commission deems appropriate under section 254. If the Commission decides the compliance filing does not conform, MCC may make a new compliance filing without having to submit a new petition for ETC designation. If the Commission decides the compliance filing does conform, then MCC may offer its universal service package to customers, advertise its universal service package throughout its designated service area, and apply to the universal service administrator for federal universal service funding.
- **Checkpoint Five: USO in Effect.** Once through the first four checkpoints, MCC provides USO and receives federal universal service funds.
- **Ongoing Oversight: Maintaining Eligibility and Continuing Compliance with Universal Service Requirements.** MCC files annual reports confirming its compliance with the ETC criteria of section 214(e), and with whatever general universal service requirements the Commission deems appropriate for MCC pursuant to section 254. MCC files these annual reports for as long as it provides universal service or until the Commission deems it no longer necessary. In addition, the Commission may act upon

[8] *See* Minn. R. 7810, 7811, 7812.

complaints concerning MCC's universal service offering for the duration of MCC's provision of universal service.

Other parties in this proceeding agree in part with the procedural steps outlined in the Department's Road to Universal Service. The incumbent LECs agree with the information required in the Checkpoints, but would compress the entire Road into a one-time checkpoint, which would be a significant barrier to entry for some carriers. The incumbent LECs argue that a petition to become a competitive ETC be rejected outright if the petitioner cannot show that it is actually providing a universal service offering throughout the incumbent LEC's service area. *See* Ex. 38 at 9-11 (Wilcox Direct Testimony); Ex. 41 at 5-8 (Farm Direct Testimony). For example, U S WEST witness Wilcox approved of the information required from MCC regarding price, terms and conditions, and service quality under Checkpoint 2 as "absolutely the kind of information that's needed," but contended that all the information should be presented at the beginning of the ETC process. Tr. Vol. 2 at 151-52 (Wilcox). As discussed above in section III.A., taking the incumbent LECs' position to its logical conclusion, there could never be a second carrier designated as a second ETC within an incumbent LEC's service area, much less a wireless carrier.

MCC, on the other hand, would modify the Road to Universal Service to remove crucial consumer protections by deleting all the checkpoints except Checkpoint One. MCC argues that the Commission has a minuscule window of jurisdiction which allows the Commission to exercise jurisdiction to designate MCC as an ETC, but which then abruptly ends -- leaving no one to monitor whether the ETC is maintaining its eligibility, using the universal service funds for permissible universal service offerings, or upholding the principles of universal service outlined in the Telecommunications Act of 1996. *See* Ex. 1 at 21 (DeJordy Direct Testimony); Ex. 2 at 3-6 (DeJordy Reply Testimony). Neither the incumbent LECs' nor MCC's procedural approaches will yield results which further the public interest.

In contrast, the questions of whether and on what conditions MCC and other companies should obtain ETC designation and universal service funding should be determined through a

competitively fair, expeditious proceeding followed by continuing State oversight. The Department's proposed process lowers barriers to competitive entry while still ensuring that petitioners fully comply with the ETC and general universal service requirements, even wireless carriers that are subject to limited Commission jurisdiction.

C. Requirements along the Road to Universal Service with which MCC has already complied.

At this point, MCC has completed Checkpoint One -- ETC Designation. MCC is a common carrier. MCC has demonstrated its ability and commitment to provide the supported services -- criteria mandated by the FCC that a carrier must satisfy in order to be designated an ETC. MCC has demonstrated that its designation as an ETC would be in the public interest in rural service areas.

1. MCC is a common carrier.

A common carrier is defined as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy." 47 U.S.C. § 153(10). CMRS providers are treated as common carriers. 47 U.S.C. § 332(c)(1)(A). MCC thus fits the definition of a common carrier.

2. MCC has demonstrated its ability and commitment to provide the nine supported services.

(1) Voice grade access to the public switched network. The FCC concluded that voice grade access includes the ability to place calls, and thus incorporates the ability to signal the network that the caller wishes to place a call. It also includes the ability to receive calls, and thus incorporates the ability to signal the called party that an incoming call is coming. *Universal Service Order* at ¶ 63. The FCC has further concluded that bandwidth for voice grade access should be, at a minimum, 300 Hertz to 3000 Hertz. *Federal-State Joint Board on Universal Service*, Fourth Order on Reconsideration, 13 FCC Rcd 2372, CC Docket No. 96-45 (1997) (*Universal Service Fourth Order on Reconsideration*), at ¶ 16. MCC witness DeJordy asserts that all MCC customers can make and receive calls on the public switched telephone network

within the specified bandwidth, through its interconnection arrangements with local telephone companies. Ex. 1 at 9 (DeJordy Direct Testimony). MCC's current provision of this service in its mobile cellular offerings demonstrates that it is capable of providing this service in its universal service offering.

(2) Local usage. While the FCC has ruled that ETCs must provide some minimum amount of local usage as part of a basic service package, the FCC has yet to determine exactly what that minimum amount should be. In its *Universal Service Order*, the FCC determined that some minimum amount of local usage should be required, and promised to "quantify an amount of local usage that must be provided without additional charge" after it issued a Further Notice of Proposed Rulemaking (FNPRM) on the subject. *Universal Service Order* at ¶¶ 67 and 65-70. The FCC did issue that FNPRM on July 18, 1997, and then issued another FNPRM on October 26, 1998. In both FNPRMs, the FCC reaffirmed its conclusion that there should be some minimum amount of local usage, and asked for comment as to that amount. *Federal-State Joint Board on Universal Service*, Further Notice of Proposed Rulemaking, 12 FCC Rcd 18514, CC Docket No. 96-45 (1997) (*Universal Service July 18, 1997 FNPRM*) at ¶¶ 178-79; *Federal-State Joint Board on Universal Service*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 21252, CC Docket No. 96-45 (1998) (*Universal Service MO&O & Oct. 26, 1998 FNPRM*) at ¶¶ 46-53.

Certainly, whatever minimum amount of local usage the FCC actually adopts will be what MCC is required ultimately to provide, and would supersede whatever the Commission might decide in the instant proceeding. However, we are currently in an interim period in which the FCC has clearly stated that there must be some minimum amount of local usage, but has not yet told us what that amount should be. The Commission essentially must choose among three options for this interim period: (1) evaluate whether MCC's universal service offering provides some minimum amount of local usage, although this amount may later be judged "wrong" by the FCC; (2) allow MCC to satisfy the local usage criterion for now without committing to any minimum amount of local usage; or (3) deny MCC's ETC Petition for now on the grounds that it

cannot satisfy the local usage criterion at this time, since the FCC has not yet fully defined that criterion.

The Commission must evaluate MCC's compliance with the local usage criterion as best it can according to the requirements the federal statute and the FCC have set forth thus far. 47 U.S.C. §§ 214(e)(1) and (e)(2) require the Commission to make an affirmative evaluation of whether MCC meets the federal criteria, including the local usage criterion. The one definitive ruling the FCC has made regarding local usage is that ETCs must provide some minimum amount as part of a basic service package. Therefore, the first option, to evaluate whether MCC offers a minimum level of local usage that the Commission deems acceptable, best satisfies the Commission's obligations under the federal statute and the FCC's rules.

MCC has committed to offer a universal service offering that includes unlimited local usage at a flat rate that is within 10 percent of the price of local service of each incumbent LEC in the relevant area. Ex. 2 at 13, 15 (DeJordy Reply Testimony); Tr. Vol. 1 at 79-86, 91-93, 122-29 (DeJordy). This commitment is sufficient for MCC to pass Checkpoint One. Even U S WEST witness Wilcox acknowledged that plus or minus 10 percent of the LEC's price is "something that the Commission might consider to be affordable." Tr. Vol. 2 at 127 (Wilcox). Ms. Wilcox went on to say that, in her "personal opinion," if MCC charged 10 percent above the U S WEST monthly rate outside the Twin Cities for unlimited local usage, that would be "reasonable." Tr. Vol. 2 at 155 (Wilcox). As discussed in sections III.B. and III.D., however, MCC must in the future provide more specific information about its pricing and local usage to actually receive federal universal service funding.

(3) Dual tone multi-frequency signaling or its functional equivalent. MCC uses out-of-band digital signaling and in-band multi-frequency signaling. Ex. 1 at 10 (DeJordy Direct Testimony). The FCC has held that out-of-band digital signaling mechanisms used by wireless carriers are the functional equivalent of dual tone multi-frequency (DTMF) signaling. *Universal Service Order* at ¶ 71. MCC's current provision of this service in its mobile cellular offerings demonstrates that it is capable of providing this service in its universal service offering.

(4) Single-party service or its functional equivalent. Single-party service means that only one customer will be served by each subscriber loop or access line. MCC offers a dedicated message path for the length of a user's particular transmission, which the FCC has concluded is the equivalent of single-party service for wireless providers. Ex. 1 at 10-11 (DeJordy Direct Testimony); *Universal Service Order* at ¶ 62. MCC's current provision of this service in its mobile cellular offerings demonstrates that it is capable of providing this service in its universal service offering.

(5) Access to emergency services. MCC must offer the ability to reach a public emergency service provider. This criterion includes access to both 911 and enhanced 911 (E911) services. Access to E911 includes the ability to provide both Automatic Numbering Information (ANI) and Automatic Location Information (ALI). However, wireless carriers are not required to implement access to E911 services fully until October 1, 2001, and even then only if the relevant locality has implemented E911 service and established a cost recovery mechanism. *Universal Service Order* at ¶¶ 72-73. MCC currently provides all of its customers with access to emergency services by dialing 911. MCC's current provision of this service in its mobile cellular offerings demonstrates that it is capable of providing this service in its universal service offering.

MCC witness DeJordy also asserted that, to date, no public emergency service provider in Minnesota has made arrangements for the delivery of ANI or ALI from MCC. Ex. 1 at 11 (DeJordy Direct Testimony). In response to a MIC information request, MCC indicated that Itasca and Koochiching counties have inquired as to MCC's E911 capabilities, and that MCC would be able to accommodate such requests and work with PSAPs on a cost recovery mechanism. Ex. 46 at attach. 4. The Commission should require MCC to make periodic reports regarding its progress towards implementing access to E911.

(6) Access to operator services. Operator services are defined as any automatic or live assistance to a consumer to arrange for billing or completion, or both, of a telephone call. *Universal Service Order* at ¶ 75 (footnote omitted). MCC currently provides all of its customers with access to operator services provided by either MCC or other entities. Ex. 1 at 11 (DeJordy

Direct Testimony). MCC's current provision of this service in its mobile cellular offerings demonstrates that it is capable of providing this service in its universal service offering.

(7) Access to interexchange services. MCC's customers have the ability to make and receive long distance calls. Although MCC does not provide equal access to interexchange service, customers are able to reach their IXC of choice by dialing the appropriate access code. Ex. 1 at 11-12 (DeJordy Direct Testimony). MCC's current provision of this service in its mobile cellular offerings demonstrates that it is capable of providing this service in its universal service offering.

(8) Access to directory assistance. Mr. DeJordy testified that all of MCC's customers are able to place a call to directory assistance by dialing "411" or "555-1212." Ex. 1 at 12 (DeJordy Direct Testimony). MCC's current provision of this service in its mobile cellular offerings demonstrates that it is capable of providing this service in its universal service offering.

(9) Toll limitation for qualifying low income customers. An ETC must offer either toll control or toll blocking services to qualifying Lifeline customers at no charge.[9] *See Universal Service Fourth Order on Reconsideration* at ¶ 115. Mr. DeJordy testifies that, although MCC does not currently have any Lifeline customers, it can and will provide toll blocking. Mr. DeJordy asserts that MCC currently provides toll blocking services for international calls and customer selected toll calls, and will use the same toll blocking technology for its Lifeline customers as part of its universal service offerings. Ex. 1 at 12 (DeJordy Direct Testimony). MCC's ability to provide toll blocking meets the toll limitation criterion.

3. It is in the public interest to designate MCC as an ETC in rural areas.

a. Overview.

It is in the public interest to designate MCC as an ETC in rural areas (provided, of course, that MCC takes further action to fully comply with the remaining steps on the Road to Universal

[9] Toll blocking allows customers to block outgoing toll calls. Toll control allows customers to limit in advance their toll usage per month or per billing cycle.

Service, as discussed above in sections III.B. and III.D.).[10] Designation of MCC as an ETC advances the universal service principles set forth in 47 U.S.C. § 254(b) by improving the provision of quality telecommunications services at affordable rates to rural, high cost customers.

b. Increased competition is one of the most important positive public interest factors.

Universal service support will allow competitors to provide service at affordable rates to rural, high cost customers. Customers will then be able to enjoy the benefits of competition, such as lower rates and higher quality services. Ex. 46 at 17 (Krishnan Supplemental Testimony). "By adoption of the 1996 Act, Congress has provided for the development of competition in all telephone markets. In a competitive market, a carrier that attempts to charge rates significantly above cost to a class of customers will lose many of those customers to a competitor." *Universal Service Order* at ¶ 17 (footnote omitted).

The incumbent LECs performed no studies, and presented no empirical evidence, that rural customers, or even rural incumbent LECs, would be harmed by designation of MCC as an ETC. Ex. 74 (U S WEST response to DPS IR No. 21); Ex. 76 (MIC response to DPS IR No. 23). Mr. Watkins acknowledged that his testimony was not supported by any empirical evidence; that he could not identify any particular MIC members that he had studied for adverse effects of designating a second ETC in their service area; that he could not state which specific MIC members' service areas do not have sufficient market demand and growth to support multiple providers; and that he had never analyzed an actual scenario with multiple ETCs in a high-cost rural areas. Tr. Vol. 2 at 74-76 (Watkins). In fact, Mr. Watkins admitted that "[t]here may be high enough growth areas for which the division of the marketplace between multiple providers would moderate the negative effects." Tr. Vol. 2 at 75 (Watkins). Likewise, Mr. Farm did not present any financial information to project any potential loss of revenue or adverse impact on any

[10] The Commission need only perform the public interest analysis required by 47 U.S.C. § 214(e)(2) for areas served by a rural LEC. *See Universal Service Order* at ¶ 135.

MIC member as a result of granting MCC ETC status. Tr. Vol. 3 at 71-72 (Farm). Rather, the incumbent LECs rely solely on abstract arguments that are misguided as well as hypothetical.

Thus, instead of presenting actual evidence of negative impact on the public interest, MIC argues, theoretically and erroneously, that competition by multiple local service providers in rural areas is categorically not in the public interest and is incompatible with universal service. On the contrary, one consideration in the establishment of the universal service system was the encouragement of competition in all markets, including rural service areas.

MIC witness Farm makes much of a statement in legislative history noting that competition may not be in the public interest in rural areas. Ex. 41 at 9-10 (Farm Direct Testimony); *see also* OAG-RUD Statement at 9-10. However, the FCC has expressly refused to rely on this legislative history, and has rejected the argument that competition and universal service are at odds in rural areas.

> Commenters who express concern about the principle of competitive neutrality contend that Congress recognized that, in certain rural areas, competition may not always serve the public interest and that promoting competition in these areas must be considered, if at all, secondary to the advancement of universal service. We believe these commenters present a false choice between competition and universal service. A principal purpose of section 254 is to create mechanisms that will sustain universal service as competition emerges. We expect that applying the policy of competitive neutrality will promote emerging technologies that, over time, may provide competitive alternatives in rural, insular, and high cost areas and thereby benefit rural consumers.

Universal Service Order at ¶ 50 (footnote omitted). Thus, the FCC has specifically stated that competition and universal service will work together for the benefit of rural consumers. Indeed, in the FCC's view, a principal purpose of creating the universal service system is to encourage competitive entry into high cost rural areas.

> This [universal service] proceeding is part of a trilogy of actions that are focused on achieving Congress's goal of establishing a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening up all telecommunications markets to competition." The

> other components of the trilogy are the local competition and access reform rulemakings. Pursuant to the mandate of the 1996 Act, these three proceedings are collectively intended to encourage the development of competition in all telecommunications markets.

Universal Service Order at ¶ 4 (quoting Joint Explanatory Statement at 1). Thus, the Commission should consider competition as one of the most important positive public interest factors, weighing in favor of designating multiple ETCs in all markets, including in rural service areas.

Disregarding federal direction to promote competition in rural areas, MIC basically argues that multiple ETCs and universal service are inherently incompatible. MIC asserts that granting MCC ETC status will reduce the universal service funding for the incumbent LECs, which in turn would increase prices, deteriorate service quality, and discourage investment necessary to maintain a high-quality network. Ex. 32 at 13-17 (Watkins Direct Testimony); Ex. 41 at 11-12 (Farm Direct Testimony). Mr. Watkins argues that supporting multiple ETCs would either decrease an incumbent ETC's amount of universal service funding, or substantially increase the size of the fund. Ex. 32 at 13-17 (Watkins Direct Testimony). These assumptions are faulty for several reasons.

First, not all of the existing subsidy mechanisms are applied towards keeping prices low. Therefore, reduction of existing subsidies to the incumbent LEC will not necessarily force the incumbent LEC to raise its prices. *See* Ex. 47 at 6 (Krishnan Supplemental Testimony). MIC's arguments are based on the old monopoly system and the existing subsidy mechanisms rather than the new competitive market and new universal service system. As Dr. Krishnan explains, the current subsidy system is inconsistent with a competitive market. Under the current system, only incumbent LECs receive subsidies. The subsidies are not explicit and have no set relation to the nine supported services, their rates, service quality, or the most efficient provision of universal service at the least cost. Ex. 47 at 7-10 (Krishnan Supplemental Testimony); Tr. Vol. 2 at 86 (Watkins) ("To what extent [the federal subsidies are] reflected totally in local basic service rates as opposed to other rates is somewhat of a fleeting question."). MIC witness Farm acknowledged

that loss of federal subsidies would not necessarily increase local rates. Tr. Vol. 3 at 82 (Farm). "[T]here's no tracking on a per dollar or support. Whether it be high cost or LTS or whether it's for switching or loop or just keeping rates low." Tr. Vol. 3 at 82 (Farm).

In contrast, the new universal service system only provides for recovery of the costs of an efficient network. The new subsidies will be explicit, competitively neutral, and portable among competing carriers. Ex. 47 at 10 (Krishnan Supplemental Testimony). The universal service funds are designed to support universal service at the lowest cost possible. Mr. Watkins criticizes the FCC's portability rules because those rules do not guarantee incumbent LECs full recovery of their embedded costs regardless of whether the carrier is operating at peak efficiency. Tr. Vol. 2 at 78-80 (Watkins). Mr. Watkins insists that all of a rural telephone company's capital investment must be recovered. Tr. Vol. 2 at 80 (Watkins). This is inconsistent with the new FCC universal service rules, under which, in order for an incumbent carrier to recover its costs and earn a profit, it would have to operate efficiently to provide universal service at the least possible cost. *See* Ex. 47 at 10-16 (Krishnan Supplemental Testimony). It is possible for rural incumbent LECs facing decreased subsidies to cut certain costs, such as overhead, instead of raising rates. *See* Tr. Vol. 2 at 78-80, 82 (Watkins); Tr. Vol. 3 at 72-74 (Farm) (noting that MIC members, instead of increasing rates, could instead reduce payroll expenses, or structure). Moreover, rural incumbent LECs can maintain their revenue stream because customers are generally subscribing to more lines. *See* Tr. Vol. 2 at 76 (Watkins). "It's possible that growth in services and revenues could keep pace with the loss of revenues created by multiple providers." Tr. Vol. 2 at 76 (Watkins); *see also* Tr. Vol. 3 at 72-74 (Farm) (noting that MIC members can and are trying to identify new sources of revenue to replace any loss of universal service subsidies to competitors). Furthermore, customers are likely to retain a wireline line even if they subscribe to a wireless carrier such as MCC; thus, the wireline service provider would retain universal service support for that line. *See* Tr. Vol. 2 at 78 (Watkins).

Moreover, MIC's position essentially appears to be that it does not like the FCC's portability rules (or in fact any threat to its members' revenue stream), and wants the Commission

to block application of those rules somehow. *See* Tr. Vol. 2 at 88-89 (Watkins). MIC's strategy appears to be to convince the Commission to do an end run around the FCC's rules by declaring that designation of MCC as an ETC in rural areas is not in the public interest. *See* Tr. Vol. 2 at 88-89 (Watkins). However, the public interest test is not meant to be used as a mechanism to avoid following FCC rules that disaffected parties or the Commission consider undesirable. Modifications to the FCC's portability rules are properly debated before the FCC; in contrast, in this proceeding, they are the current law of the land, and carriers and the Commission must follow them.

Second, competition will improve service quality. Competition will force all ETCs, including incumbent LECs, to provide better quality service in order to attract new customers and retain their customer base. *See* Ex. 47 at 6 (Krishnan Supplemental Testimony). "[A]s competition in the telecommunications industry increases, consumers will select their providers based on, among other factors, the quality of service offered." *Universal Service Order* at ¶ 100.

Third, there is no reason to believe that granting ETC status to MCC will impose undue strain on the amount of the fund. Even if wireless service is often used as a second line, the FCC has already decided to fund additional lines. *See* Ex. 47 at 6-7 (Krishnan Supplemental Testimony); *Universal Service Order* at ¶ 96. Not allowing support for wireless service would be discriminatory and would not be technology-neutral. In addition, funding sources have been significantly increased by requiring contributions from all providers of telecommunications services. It is not in the public interest to expand the sources of funding, but limit payment only to the rural incumbent LECs. *See* Ex. 47 at 7 (Krishnan Supplemental Testimony).

c. Designation of MCC would promote competitive neutrality.

Designation of MCC would also promote competitive neutrality, set forth by the FCC as a guiding universal service principle. "[C]ompetitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." *Universal Service Order* at ¶

47. The FCC wished "to facilitate a market-based process whereby each user comes to be served by the most efficient technology and carrier" and concluded that "competitively neutral rules will ensure that such disparities are minimized so that no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition by limiting the available quantity of services or restricting the entry of potential service providers." *Universal Service Order* at ¶ 48.

The FCC mandated that the universal service system encourage competitive entry of different technologies, and that the market would determine which technology served consumers best. MCC's universal service offering may offer consumer benefits that a rural incumbent LEC does not. The FCC pointed out specifically that wireless technologies may be used to serve rural and high cost areas more efficiently than wireline. "We find that imposing additional burdens on wireless entrants would be particularly harmful to competition in rural areas, where wireless carriers could potentially offer service at much lower costs than traditional wireline service." *Universal Service Order* at ¶ 190. In addition, MCC claims that its universal service offering will provide a larger calling scope. Ex. 1 at 15 (DeJordy Direct Testimony). Also, its universal service offering will have limited mobility. Ex. 1 at 15 (DeJordy Direct Testimony); Tr. Vol. 1 at 152-53 (DeJordy). MIC witness Cornelius acknowledged that wireless service provides features that wireline service does not, and that consumers benefit from access to these features. Tr. Vol. 1 at 284-86 (Cornelius). Increased customer access to a choice of desirable service features is in the public interest.

Arguments made by the incumbent LECs would violate the principle of competitive neutrality by making it virtually impossible for any wireless carrier to receive ETC designation. *See* Tr. Vol. 2 at 65-66 (Watkins) (asserting that Commission's lack of jurisdiction over CMRS providers' rates make it not in public interest to designate MCC an ETC); Tr. Vol. 3 at 64, 67-69 (Farm) (arguing that no wireless carrier today should be designated as an ETC in a rural LEC area because the FCC has not yet resolved outstanding issues); *see also* Tr. Vol. 1 at 285-86 (Cornelius). However, the FCC has specifically ordered that wireless carriers receive equal

consideration for ETC designation. "We anticipate that a policy of technological neutrality will foster the development of competition and benefit certain providers, including wireless, cable, and small businesses, that may have been excluded from participation in universal service mechanisms if we had interpreted universal service eligibility criteria so as to favor particular technologies." *Universal Service Order* at ¶ 49. "All carriers, including commercial mobile radio service (CMRS) carriers, that provide the supported services, regardless of the technology used, are eligible for ETC status under section 214(e)(1). *Universal Service 7th R&O and 13th Order on Reconsideration and FNPRM* at ¶ 72 (footnote omitted). Thus, not designating MCC as an ETC on the basis that it is not in the public interest to designate wireless carriers as ETCs would violate the FCC's principle of competitive neutrality. Carrying out a guiding principle of the universal service system is in the public interest.

d. Substitutability and COLR obligations should not be public interest factors.

The Commission should not decide that it is not in the public interest to designate MCC as an ETC on the basis that MCC's universal service offering will not be an exact substitute for wireline service, nor on the basis that MCC is not committing to assume the specific state carrier of last resort (COLR) obligations. The Department disagrees with the contention of U S WEST that, before designating a CMRS carrier as an ETC, the Commission must determine that the CMRS carrier's service is an exact substitute for wireline service. *See* U S WEST Statement at 7-10; Ex. 38 at 36-38 (Wilcox Direct Testimony). U S WEST primarily justifies this claim by arguing that, once MCC has been designated an ETC, an incumbent LEC in MCC's designated service area can relinquish its ETC designation under 47 U.S.C. § 214(e)(4) and cease providing service under universal service obligations, leaving customers with MCC as the only provider of universal service. U S WEST Statement at 7-10. On the contrary, section 214(e)(4) is a procedural safeguard empowering the Commission to ensure that any relinquishment of ETC designation will not result in customers in the service area being left without universal service.

The FCC expressly declined to impose carrier of last resort (COLR) obligations, or any other obligations similar to those of section 214(e)(4), as additional conditions of eligibility. *Universal Service Order* at ¶¶ 142-43. The FCC specifically differentiated between the ETC criteria required under section 214(e)(1) and the section 214(e)(4) requirements.

> Exit barriers comparable to those imposed on ILECs are unnecessary because section 214(e)(4) already imposes exit barriers similar to the protections imposed by traditional state COLR regulation. We conclude that additional exit barriers are not only incompatible with the requirements of section 214(e)(1), but also that they are not warranted.

Universal Service Order at ¶ 143. The ETC obligation to provide quality and affordable service throughout the entire designated area is similar enough to the COLR protections so as to render assumption of the specific state COLR obligations unnecessary.

Moreover, it is unlikely that an area will suddenly lose service. First, it is improbable that an incumbent LEC will completely withdraw service. Under Minn. Rule 7811.0600, subp. 6, a local service provider (LSP) "shall not withdraw from a service area unless another LSP certified for that area will be able to provide basic local service to the exiting [LSP's] customers immediately upon the date the exiting [LSP] discontinues service." Minn. Rule 7811.0100, subp. 34, defines an LSP as "a telephone company or telecommunications carrier providing local service in Minnesota pursuant to a certificate of authority granted by the commission." The Commission does not certify CMRS providers. Thus, the wireline incumbent LEC cannot withdraw simply because a CMRS carrier enters its service area. It would not seem to make economic sense for the incumbent LEC to relinquish its ETC designation, and thus its universal service funding, if it must continue providing service in the area regardless. Incumbent LECs must provide the basic service requirements of Minn. Rule 7811.0600, which are even more extensive than the FCC's ETC criteria. In fact, MIC witness Farm acknowledged that not one MIC member has plans to relinquish its ETC designation if MCC receives ETC designation, much less withdraw its service. Tr. Vol. 3 at 77 (Farm).

Second, even if the incumbent LEC in a region goes out of business or otherwise ceases providing service, and the CMRS provider is the only provider remaining, the Commission could claim the CMRS provider is a substitute for land line telephone exchange service subject to increased state regulation, and could petition the FCC for authority to regulate the CMRS provider's rates under 47 U.S.C. § 332(c)(3)(A). 47 U.S.C. § 332(c)(3)(A) permits states to regulate CMRS rates in limited circumstances:

> Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that--
>
> (i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
>
> (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

Thus, even regulation of MCC's rates may not be beyond the Commission's jurisdiction if circumstances warrant.

In addition, MCC has indicated that its universal service offer will likely use fixed wireless local loop technology. Tr. Vol. 1 at 147 (DeJordy). The FCC has indicated that it may decide to regulate fixed wireless service more like wireline service than CMRS. *Amendment of the Commission's Rules To Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8965, WT Docket No. 96-6 (1996) (*Flexible Service Offerings in CMRS Order*), at ¶¶ 46-57. The FCC is specifically considering allowing states to subject a CMRS provider's fixed wireless service to

state regulation by petitioning the FCC under section 332(c)(3). *Flexible Service Offerings in CMRS Order* at ¶ 56. Fixed wireless communications services offered under 47 C.F.R. Part 27 do not even receive the protection of section 332(c)(3)(A) against state regulation. "We note that Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3), preempts State regulation of rates and entry for CMRS providers, and that no equivalent statutory provision exists for fixed wireless providers." *Amendment to Parts 2, 15, and 97 of the Commission's Rules to Permit Use of Radio Frequencies Above 40 GHz for New Radio Applications*, Memorandum Opinion and Order on Reconsideration and Notice of Proposed Rulemaking, 13 FCC Rcd 16947, ET Docket No. 94-124 (1998), at ¶ 107 n.184. Thus, section 332(c)(3)(A) is not an impenetrable wall absolutely prohibiting state regulation of CMRS providers' rates, especially as new technologies blur the traditional line between wireline and wireless.

D. Requirements of the Road to Universal Service with which MCC must comply in the future if the Commission grants ETC designation.

MCC must still pass Checkpoints Two through Five, and be subject to continuing oversight, as discussed above in section III.B. Specifically in regard to Checkpoint Two, MCC must submit a detailed universal service offering that includes its calling plans. That offering should contain the specific price for unlimited local usage. At that point, the Commission should evaluate the prices for affordability. The detailed universal service offering should also include specific service quality standards. MCC should be ordered to identify in its offering with which Minnesota laws and regulations concerning service quality it will comply, and explain why it should not have to comply with any law or regulation which it will not follow. At that point, the Commission should evaluate whether MCC's universal service offering will meet adequate service quality standards. Finally, MCC must file with the Commission a plan that advertises the availability of its universal service offering and the charges therefor using media of general distribution.

Compliance with Checkpoint Two should not overly burden MCC. In fact, Mr. DeJordy testified that MCC is already planning to take steps similar to those outlined in Checkpoint Two --

identifying precisely what the rates, terms, and conditions of MCC's service offering would look like, taking into consideration the existing Minnesota rules on service quality matters such as deposits and disconnections, and identifying with which rules the service offering is consistent. *See* Tr. Vol. 1 at 123-23, 223-24 (DeJordy). Furthermore, Mr. DeJordy indicated that MCC would comply with the entire Road to Universal Service process if so ordered by the Commission. *See* Tr. Vol. 1 at 228 (DeJordy).

IV. SERVICE AREA FOR WHICH MCC SHOULD RECEIVE ETC DESIGNATION.

A. MCC should receive ETC designation for the service area that it has requested.

If the Commission grants MCC's ETC Petition, MCC should receive ETC designation for the service area that it has requested. MCC has followed the standards set by the Commission and the FCC in identifying its requested universal service area. Minn. Rule 7812.1400, subp. 3, requires that, in areas not served by a rural telephone company, the Commission shall designate the incumbent LEC's exchange area as the applicable universal service area. MCC is requesting all of the non-rural telephone companies' (U S WEST, GTE-Minnesota, and Frontier) exchanges fully contained within its signal coverage area as part of its universal service area.

Minn. Rule 7811.1400, subp. 3, requires that, in areas served by a rural telephone company, the Commission shall designate the incumbent LEC's study area as the applicable universal service area, unless the Commission and the FCC adopt a different service area pursuant to 47 C.F.R. § 54.207(c) and (d). For the areas served by a rural telephone company, MCC has included in its requested service area only those companies whose entire study areas are ensconced within MCC's signal coverage area. *See* Ex. 46 at 14-15 (Krishnan Direct Testimony).

B. The Commission should not treat Frontier as a rural telephone company in this proceeding, and should thus allow ETC designation in Frontier territory by exchange area rather than by entire study area.

The Commission should not treat Frontier as a rural telephone company in this proceeding. The Commission has not determined that Frontier is a rural telephone company

under 47 U.S.C. § 153(37)(D). In addition, the public interest supports treating Frontier as a non-rural telephone company. Thus, if the Commission decides to designate MCC as an ETC, that designation should include the Frontier exchanges for which MCC has requested designation.

Frontier claims that it is a rural telephone company because its local affiliate, Frontier of Minnesota, is allegedly "a local exchange carrier operating entity . . . that . . . has less than 15 percent of its access lines in communities of more than 50,000 on February 8, 1996." Ex. 44 at 4 (Phillips Direct Testimony) (quoting 47 U.S.C. § 153(37)(D)). The FCC has recently recognized that various carriers are interpreting this statutory language differently and has requested comment on the appropriate definitions. *Federal-State Joint Board on Universal Service; Forward-Looking Mechanism for High Cost Support for Non-Rural LECs*, Further Notice of Proposed Rulemaking, CC Docket Nos. 96-45 & 97-160 (1999) (*Universal Service May 28, 1999 FNPRM*), at ¶¶ 249-54. As a result, the same carrier may or may not fit under the section 153(37)(D) rural telephone company definition, depending on which interpretation is used.

First, various carriers are defining the term "local exchange carrier operating entity" differently. The FCC is seeking comment on whether that term refers to an entity operating at the study area level or at the holding company level. *Universal Service May 28, 1999 FNPRM* at ¶¶ 250-51. Frontier witness Phillips' claim that Frontier is a rural telephone company assumes that the relevant operating entity is Frontier of Minnesota, operating at the study area level. Tr. Vol. 3 at 109 (Phillips). Phillips acknowledged that Frontier would not qualify as a rural telephone company if the holding company is the operating entity. Tr. Vol. 3 at 110 (Phillips).

Second, various carriers are defining the term "communities of more than 50,000" differently. The FCC described two methods that carriers have used to identify communities of more than 50,000. The first is using Census Bureau statistics for legally incorporated localities, consolidated cities, and census-designated places. The second is using the methodology in section 54.5 of the FCC's rules to determine whether a community is in a rural area -- calculating the carrier's percentage of rural/non-rural lines by determining whether each of the carrier's wire centers is associated with a metropolitan statistical area (MSA). *Universal Service May 28, 1999*

FNPRM at ¶ 252. Frontier witness Phillips acknowledged that Frontier is using Census Bureau statistics to define "communities of more than 50,000." Phillips admitted that, if Frontier were to use the methodology based on MSAs, then Frontier would not fit the section 153(37)(D) definition of a rural telephone company. Tr. Vol. 3 at 115-16 (Phillips).

If each of these two terms in the statutory provision has two possible definitions, then there are four possible interpretations:

(1) define "local exchange carrier operating entity" by study area; and "communities of more than 50,000" by Census Bureau statistics (Frontier's interpretation).

(2) define "local exchange carrier operating entity" by national holding company; and "communities of more than 50,000" by Census Bureau statistics.

(3) define "local exchange carrier operating entity" by study area; and "communities of more than 50,000" by MSAs.

(4) define "local exchange carrier operating entity" by national holding company; and "communities of more than 50,000" by MSAs.

Frontier only qualifies as a rural telephone company under one of these four possible interpretations -- interpretation (1). Under three of these four possible interpretations -- interpretations (2), (3), and (4) -- Frontier's rural telephone company claim fails. Frontier has the burden of demonstrating to the Commission why, of these four possible interpretations, the Commission should adopt the one and only interpretation that would allow Frontier to qualify as a rural telephone company. Frontier has not offered any evidence or arguments justifying its chosen interpretation.

On the contrary, there are strong precedential and public policy arguments against adopting Frontier's preferred interpretation. Unless the FCC holds otherwise, the Commission should not adopt an interpretation that defines "local exchange carrier operating entity" by study area (*i.e.*, interpretations (1) or (3)), but should instead define "local exchange carrier operating entity" as the national holding company, Frontier Corporation (*i.e.*, interpretations (2) or (4)).

Commission precedent defines "local exchange carrier operating entity" as the national holding company for the purposes of the section 153(37)(D) rural telephone company exception. In a case involving GTE, GTE made the same argument that Frontier makes here -- that the 15 percent test in § 153(37)(D) should be applied to its Minnesota subsidiary, Contel of Minnesota, Inc. d/b/a GTE Minnesota. *In the Matter of AT&T Communications of the Midwest, Inc.'s (AT&T's) Petition for Arbitration with GTE Communications, Inc. (GTE) Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996*, Order Denying Claim to Rural Company Exemption Under Section 251(f)(1) of the Telecommunications Act of 1996, Docket No. P-442, 407/M-96-939 (Minn. PUC 1996) (*Order Denying GTE Claim to Rural Company Exemption*), at 4-5. The Commission rejected GTE's argument and held instead that it "considers GTE's national domestic telephone operations, based in Irving, Texas, the appropriate operating entity for evaluating GTE's claim." *Id*. at 4. The Commission cited the "close operational ties" between the state affiliate and the parent company. The Commission also decided that the Act and its legislative history indicated that Congress did not intend to apply the exemption to a company such as GTE. *Id*. Likewise, the Commission in this case should consider Frontier's national domestic telephone operations the appropriate operating entity for evaluating Frontier's claim.

Public policy also argues against treating Frontier as a rural telephone company. Rural telephone companies receive numerous protections, which go far beyond the question in this case of whether MCC must cover Frontier's entire study area. For example, rural telephone companies may be exempt from the 47 U.S.C. § 251(c) requirements, including negotiating in good faith with a requesting carrier, interconnecting with competing carriers in a nondiscriminatory manner, providing unbundled network elements, and offering services for resale at wholesale rates. 47 U.S.C. § 251(c), (f). Congress did not mean for these protections to apply to a nationally significant company such as Frontier.

If the Commission decides to deem Frontier a rural telephone company, then this would further support disaggregating rural telephone company service areas as recommended below in

section IV.C. "Rural telephone companies" such as Frontier which actually have a nationally significant presence should not be able to prevent competition by requiring competitors to cover their entire study areas.

C. The Commission should alter the definition of a rural service area.

The Commission should consider altering the definition of a rural service area by disaggregating the rural telephone companies' study areas into smaller service areas, so that MCC may serve those parts of the study areas that are fully contained within MCC's signal coverage area. 47 U.S.C. § 214(e)(5) directs state commissions to define the term "service area" for areas not served by a rural telephone company. The Commission has defined "service area" for non-rural areas as the local exchange carrier's exchange area, "unless the Commission finds that a smaller geographic unit would be more appropriate, based on consideration of the relevant high-cost areas designated by the FCC and the public interest." Minn. R. 7812.1400, subp. 3. For an area served by a rural telephone company, "service area" means the rural telephone company's study area, "unless and until the [FCC] and the States, after taking into account the recommendations of a Federal-State Joint Board instituted under section 410(c) of this title, establish a different definition of service area for such company." 47 U.S.C. § 214(e)(5); *Universal Service Order* at ¶ 182.

The FCC encouraged states to alter the definition of a rural service area to consist of smaller portions of an incumbent LEC study area, specifically to respond to wireless carriers' concerns that they might not be able to provide service throughout a rural telephone company's study area. *Universal Service Order* at ¶ 189. The FCC concluded that requiring a carrier to serve an entire rural telephone company study area "as a prerequisite to eligibility might impose a serious barrier to entry, particularly for wireless carriers. . . . imposing additional burdens on wireless entrants would be particularly harmful to competition in rural areas, where wireless carriers could potentially offer service at much lower costs than traditional wireline service." *Universal Service Order* at ¶ 190 (footnotes omitted).

The Commission can redefine a rural service area in this proceeding, or at least begin the procedure for redefinition. The FCC established a procedure for a state commission, or another party, to petition the FCC for such redefinition. Basically, the state commission or other party submits a petition to the FCC containing the proposed new definition and the state commission's ruling explaining its reasoning. If the FCC chooses to initiate a proceeding to consider the petition, the proposed definition will not take effect until the FCC and the state commission reach an agreement. If the FCC does not act on the petition within ninety days of the FCC's Public Notice of the petition, then the state commission's definition is deemed approved by the FCC. 47 C.F.R. § 54.207(c); *Universal Service Order* at ¶¶ 186-88. The FCC anticipated that state commissions would consider the issue of redefining service areas as they make findings that the designation of an additional ETC in a rural service area is in the public interest. *Universal Service Order* at ¶ 190.

V. CONCLUSION.

MCC should be designated as an ETC for purposes of receiving federal universal service funding, as long as it completes further actions necessary to fully comply with the eligibility requirements for receiving federal universal service funding. The Commission has broad jurisdiction to evaluate carriers' compliance with the ETC and general universal service requirements, both at the time of and after ETC designation. The Commission should adopt the Department's Road to Universal Service, which establishes a competitively fair, expeditious administrative process for evaluating a petition for ETC designation. MCC has successfully completed Checkpoint One on the Road -- MCC has demonstrated that it is a common carrier, that it has the ability and intent to provide the nine supported services identified by the FCC, and that its designation in rural service areas would be in the public interest. MCC must now complete the remaining Checkpoints -- filing of its detailed universal service offering, including specific prices, terms, and conditions, to the Commission for further evaluation and comment by other parties; and submission to continuing Commission oversight. Finally, if MCC is designated

as an ETC, it should receive ETC designation in the service area that it has requested, including the requested Frontier exchanges. The Commission should also consider disaggregating the rural telephone companies' study areas into smaller service areas.

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